LIBRARY
SUPREME COURT, U.S.
JUL 18 1957
JOHN T. FEY, CLERK

No. 131

In the Supreme Court of the United States

OCTOBER TERM, 1957

HERBERT SIMPSON, DONALD M. WOLLAM AND JOHN ROGERS MACKENZIE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement	4
Discussion	7
Conclusion	21

CITATIONS

Cases:

Barenblatt v. *United States*, No. 742, Oct. Term, 1956, certiorari granted and reversed, June 24, 1957	10
Belvin v. *United States*, 12 F. 2d 548, certiorari denied, 273 U. S. 706	16
Blau v. *United States*, 340 U. S. 159	7, 8
Bowman Dairy Co. v. *United States*, 341 U. S. 214	16
Brunner v. *United States*, 343 U. S. 918	9
Eisler v. *United States*, 170 F. 2d 273, certiorari dismissed, 338 U. S. 883	12
Emspak v. *United States*, 349 U. S. 190	9, 21
Haussener v. *United States*, 4 F. 2d 884	16
Herzig v. *Swift & Co.*, 146 F. 2d 444	18
Hoffman v. *United States*, 341 U. S. 479	8, 9
Keeney v. *United States*, 218 F. 2d 843	14
Ko-ed Tavern, In re, 129 F. 2d 806	18
Mason v. *United States*, 244 U. S. 362	9
Quinn v. *United States*, 349 U. S. 155	12, 21
Sinclair v. *United States*, 279 U. S. 263	12, 14
Singleton v. *United States*, 343 U. S. 944	9
Temple v. *Commonwealth*, 75 Va. 892	8
Trock v. *United States*, 351 U. S. 976	9
United States v. *Deutch*, 235 F. 2d 853	11
United States v. *Lamont*, 236 F. 2d 312	13
United States v. *Orman*, 207 F. 2d 148	14
Wilkes v. *United States*, 291 Fed. 988, certiorari denied, 263 U. S. 719	16
Young v. *United States*, 212 F. 2d 236, certiorari denied, 347 U. S. 1015	15

Page

Statutes and rules:
2 U. S. C. 192 (R. S. 102, as amended, 52 Stat. 942) 4
Federal Rules of Criminal Procedure:
Rule 7 (c) 11, 12, 13
Rule 52 (a) 11, 13
Rule XI of the House of Representatives 10
Miscellaneous:
H. Rep. 2463, 83d Cong., 2d sess, as copied at 100 Cong. Rec. 11628–30 7
4 Wigmore, *Evidence* (3d ed. 1940), § 1178 19

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 131

HERBERT SIMPSON, DONALD M. WOLLAM AND JOHN ROGER MACKENZIE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals in the *Simpson* case (4 Simp. R. 3–6)[1] is reported at 241 F. 2d 222. The opinions of the Court of Appeals in the *Wollam* and *MacKenzie* cases (Woll. R. 111–122; MacK. R. 100–104) have not yet been reported. The three opinions appear as Appendices A, B, and C, respectively, to the petition for a writ of certiorari (Pet. 31–60).

[1] The record in the *Simpson* case, which has not been printed, is in four volumes. We shall refer to it by the designation "Simp. R." with a figure prefix to indicate the number of the volume. The *Wollam* and *MacKenzie* records, which have been printed, will be referred to as "Woll. R." and "MacK. R.," respectively.

JURISDICTION

The judgment of the Court of Appeals in the *Simpson* case was entered on February 11, 1957 (4 Simp. R. 7), and a petition for rehearing was denied on April 13, 1957 (*id.* 8). The judgments of the Court of Appeals in the *Wollam* and *MacKenzie* cases were both entered on May 2, 1957 (Woll. R. 123; MacK. R. 117). By order of Mr. Justice Douglas, petitioner Simpson's time for filing a petition for a writ of certiorari was extended to June 12, 1957. The joint petition of the three petitioners was filed on May 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the circumstances reflected by this record, petitioners properly invoked their privilege against self-incrimination in refusing to tell the committee where they resided and to answer similar "identifying questions," on the theory that the answers to such questions would have tended to identify them as persons with respect to whom the committee had information tending to show Communist Party affiliations.

2. Whether the indictments were fatally defective in that—

(*a*) they allegedly failed to state the nature of the "question under inquiry" at the time of petitioners' appearances before the House Committee on Un-American Activities and refusals to answer questions;

(*b*) they allegedly failed to state that the refusals to answer were either "willful" or "unlawful";

(*c*) they failed to state specifically that the refusals to answer were "without just, proper or legal cause";

(*d*) they failed to specify wherein the questions which petitioners refused to answer were pertinent to the subject of inquiry.

3. Whether one charged under 2 U. S. C. 192 with refusal to answer questions of a congressional committee which were "pertinent to the question under inquiry" is entitled to have the issue of the pertinency of the questions heard and decided by the jury.

4. Whether a witness before a congressional committee who refuses to answer a pertinent question is immune to prosecution under 2 U. S. C. 192 by reason of the fact that the committee "already knows" the answer to the question or has information with respect thereto from other sources.

5. Whether the trial court properly refused to grant petitioner Simpson a subpoena *duces tecum* calling for all of the committee's files containing "information about" him.

6. Whether the trial court erred in—

(*a*) selecting the *Simpson* jury from the same panel from which the *Wollam* jury had been selected the preceding day;

(*b*) refusing to permit counsel for petitioner Simpson to interrogate an F. B. I. agent for the alleged purpose of attempting to show that the agent "had information" about Simpson which would have been relevant to the issue of the propriety of the latter's invocation of his privilege against self-incrimination;

(*c*) permitting "material acts of Congress, the committee and the subcommittee to be proved by parol

evidence without showing that the records of the alleged acts were unavailable";

(*d*) allegedly failing to provide petitioner Simpson with an opportunity to present evidence on the issues of pertinency and privilege outside the presence of the jury;

(*e*) allegedly sentencing petitioner Simpson "for something that [he] did not say."

STATUTE INVOLVED.

2 U. S. C. 192 (R. S. 102, as amended; 52 Stat. 942) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

Petitioners—Herbert Simpson, Donald M. Wollam, and John Rogers MacKenzie—were charged in separate indictments, returned in the United States District Court for the District of Oregon, with having refused, in violation of 2 U. S. C. 192, *supra,* to answer

questions, pertinent to the matter under inquiry, put to them by a subcommittee of the Committee on Un-American Activities of the House of Representatives (1 Simp. R. 10–11; Woll. R. 3–4; MacK. R. 3–4). The indictments were in six, five, and four counts, respectively, the several counts setting forth the specific questions which the accused had refused to answer. Count 1 of each indictment charged refusal by the accused to state his place of residence at the time of his appearance before the committee. The remaining counts of the *Simpson* indictment—excluding the third count, which was later dismissed (2 Simp. R. 105–106)—charged refusal by Simpson to state whether it was not a fact that he lived at a designated address in Portland, Oregon (count 2), to give a resume of his educational background (count 4), and to state whether he had ever gone to high school (count 5), or ever served in the armed forces (count 6). The remaining counts of the *Wollam* indictment charged refusal by Wollam to state where he was employed (count 2), and whether he had ever attended elementary school (count 3), high school (count 4), or college (count 5). The remaining counts of the *MacKenzie* indictment charged refusal by MacKenzie to state where he was employed (count 2), whether he had ever attended Reed College (count 3), and his age (count 4).

Following separate trials by jury, each petitioner was found guilty on each count of the indictment involving him (with the exception of petitioner Simpson in respect of the dismissed count of his indictment, see *supra*) (1 Simp. R. 38; Woll. R. 29; MacK.

R. 24). Petitioners Simpson and MacKenzie were each sentenced to ten months' imprisonment and petitioner Wollam to one year's imprisonment on each count of their respective indictments, the terms to run concurrently, and each petitioner was in addition fined $250 on count 1 of his respective indictment (1 Simp. R. 43; Woll. R. 32; MacK. R. 27). On appeal to the Court of Appeals for the Ninth Circuit, the judgments of conviction were affirmed.

The evidence adduced by the Government at the trials may be summarized as follows:

Petitioners were three of a group of witnesses who were subpoenaed to testify before a subcommittee of the House Committee on Un-American Activities in public hearings held on June 18 and 19, 1954, in connection with an investigation which the committee was conducting into Communist activities in the Portland, Oregon, area (2 Simp. R. 21, 23–24; Woll. R. 49–50; MacK. R. 40). Each petitioner appeared before the committee, was sworn, and gave his name, but refused to answer any other questions propounded by the committee, including those forming the bases of the several counts of the respective indictments (see *supra*, p. 5), on the asserted ground, among others, that his answer would tend to incriminate him (2 Simp. R. 26–32; Woll. R. 52–56; MacK. R. 42–45). With respect to the questions involved in the indictments, each petitioner's claim of privilege was overruled by the committee and he was directed to answer (*ibid.*). The committee's questions included, in addition, whether petitioners were or ever had been members of the Communist Party, their claims of

privilege as to these questions being accepted by the committee.[2]

DISCUSSION

1. Of the six questions which petitioner Simpson alleges are presented (Pet. 2–5), and in which petitioners Wollam and MacKenzie join (Pet. 25–27), the fourth question raises, we believe, the only serious problem and will be discussed first:

Petitioner Simpson contends (Pet. 16–21) that his invocation of the privilege against self-incrimination with respect to each of the questions involved in the several counts on which he was convicted (see *supra*, p. 5) was proper because "a witness who rightfully exercises the privilege under the Fifth Amendment as to questions on which the inquiring committee has incriminating evidence against the witness, may also exercise the privilege as to identifying questions which would identify him as the person against whom the committee has that incriminating evidence" (Pet. 16–17). In other words, Simpson urges (see Pet. 18–20) that, since he properly invoked his privilege when questioned as to his Communist Party affiliations (see *supra*, pp. 6–7, and *Blau* v. *United States*, 340 U. S. 159), he had a concomitant right, in view of the fact that the committee had information that he

[2] The pertinent portions of the transcript of the committee proceedings relating to petitioners Wollam and MacKenzie, containing in their context the questions asked and the refusals to answer, are set forth in the respective opinions of the Court of Appeals. See Woll. R. 116–122 (Pet. 42–52); MacK. R. 100–104 (Pet. 54–59). For the pertinent part of the transcript of the committee proceedings relating to petitioner Simpson, see H. Rep. 2463, 83d Cong., 2d sess., as copied at 100 Cong. Rec. 11628–30.

was a Party member (2 Simp. R. 25; Pet. 18–20), to refuse to answer "identifying questions," the answers to which would establish that he was the person in respect of whom the committee had such information, because to give such answers would have "furnished a link in the chain of evidence needed in a prosecution of [him] for violation of (or conspiracy to violate) the Smith Act" (*Blau* v. *United States, supra,* 340 U. S. at 161).

We feel constrained to agree that, on the particular facts of this case, answers to the identifying questions might have tended to be incriminating. At least, we think, "it was not 'perfectly clear, from a careful consideration of all the circumstances in the case,'" that the answers could not "'possibly have such tendency' to incriminate" (*Hoffman* v. *United States,* 341 U. S. 479, 488, quoting with approval from *Temple* v. *Commonwealth,* 75 Va. 892, 898; emphasis in the original). Disclosure of one's residence might prove incriminating if Party meetings were, as here, alleged to have been held there.[4] Answers to questions relating to educational background and military

---

[3] The committee also had information concerning Party activities and associations on the part of petitioners Wollam and MacKenzie (Woll. R. 50; MacK. R. 42).

[4] Apart from the fact that the answers to the questions would have tended to identify the petitioners as the persons with respect to whom the committee had evidence showing Communist Party affiliations, the committee appears to have had information that Communist Party meetings were held in the home of one of these petitioners (MacKenzie) (Pet. 28)—a fact which, if true, would have been an added reason why that petitioner, at least, might genuinely have feared that to disclose his residence (count 1) would have been incriminating.

service might also serve to identify the witness as the person who had been accused by other witnesses of having engaged in Party activities at certain times and places, such as at Reed College. Even the question as to age (count 4 of the MacKenzie indictment), if answered, might have identified the witness as the person who, while attending Reed College (see count 3 of the MacKenzie indictment), engaged in Communist Party activities.

We recognize, of course, that the protection furnished by the Fifth Amendment "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer," and "his say-so does not of itself establish the hazard of incrimination." *Hoffman v. United States, supra,* 341 U.S. at 486. The danger, in short, must be "real and appreciable," not merely "imaginary and unsubstantial." *Mason* v. *United States,* 244 U. S. 362, 365–366. For this reason, identifying questions are normally not incriminating. However, under the special facts here presented, we do not believe it can be fairly said that petitioners could not possibly have feared that to answer the questions would have been incriminating. Cf. *Hoffman* v. *United States,* 341 U. S. 479; *Brunner* v. *United States,* 343 U. S. 918; *Singleton* v. *United States,* 343 U. S. 944; *Trock* v. *United States,* 351 U. S. 976. And see *Emspak* v. *United States,* 349 U. S. 190, 198–201.

Accordingly, it is our view that the convictions cannot be sustained, and we respectfully suggest that the Court grant the petition for a writ of certiorari and

that the judgments be reversed without further briefs or argument.

There is no merit, we believe, to the other points raised by petitioners.

2. Petitioners contend that the indictments should have been dismissed as fatally deficient on several grounds (Pet. 10–13, 25).

(*a*) The point (Pet. 10–11, 25, 27) that the indictments were deficient for failing "to set forth the question under inquiry" (Pet. 10) by the committee at the time of petitioners' appearances is substantially identical with one of the contentions made in the petition for certiorari in No. 742, Oct. Term, 1956, *Lloyd Barenblatt* v. *United States,* certiorari granted and reversed on other grounds on June 24, 1957. Here, as there, each of the indictments alleged that the committee "was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and to H. Res. 5, 83d Congress," and that the accused appeared and refused to answer questions "which were pertinent to the question then under inquiry."[5] Our reply in *Barenblatt* (Br. in Opp., pp. 14–16) is accordingly applicable to this case.

As we there point out (at p. 15), the reference to "Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828)" and "H. Res. 5, 83d Congress" is a reference to the House Rule (XI) under which the Committee on Un-American Activities operates, which Rule (see Pet. 6–7) confers on the committee the authority to investigate "the extent, character, and ob-

[5] 1 Simp. R. 10; Woll. R. 3; MacK. R. 3.

jects of un-American propaganda activities in the United States," "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution," and "all other questions in relation thereto that would aid Congress in any necessary remedial legislation." We believe that this is a sufficiently explicit statement of the "question under inquiry" to satisfy the requirement of Rule 7 (c) of the Federal Rules of Criminal Procedure (see Pet. 7) that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged"—particularly where, as here, petitioners have never contended, and do not now contend, that they were unaware of the nature of the "question under inquiry" by the committee (see Rule 52 (a), F. R. Crim. P.).

(*b*) Also without merit is the contention (Pet. 11–12, 25, 27) that each indictment was fatally deficient for failing to allege that the accused's refusal to answer questions was either "willful" or "unlawful" (Pet. 11). Each indictment charged that the refusal was "in violation of" 2 U. S. C. 192.[6] This was a plain allegation that the refusal was unlawful. No more, as petitioners concede (Pet. 11), was required. *United States* v. *Deutch*, 235 F. 2d 853, 854 (C. A. D. C.). Furthermore, as noted in *Deutch*, and as the court below also pointed out (Pet. 33–34), "[t]o decline or refuse to answer a question * * * is by its

[6] 1 Simp. R. 11; Woll. R. 4; MacK. R. 4.

very nature a deliberate and willful act" (235 F. 2d at 854).[7]

(*c*) Petitioner Simpson's related contention (Pet. 12–13)—that the indictment was defective for failing to aver that his refusals to answer were "without just, proper or legal cause" (Pet. 12)[8]—is equally without substance. The allegation that the refusals were "in violation of" 2 U. S. C. 192 (1 Simp. R. 11) in effect charged that they were made without just cause, and, in any event, under Rule 7 (c), F. R. Crim. P. (see *supra*, p. 11), an indictment need not negative the existence of affirmative defenses. *Eisler* v. *United States*, 170 F. 2d 273, 280–281 (C. A. D. C.), certiorari dismissed, 338 U. S. 883.

(*d*) Petitioners' final argument relating to the sufficiency of the indictments (Pet. 13, 25, 27)—that they were defective for failing to specify the pertinency of the questions to the subject of the committee's investigation—is likewise without merit. Each indictment charged that the questions "were pertinent to the question then under inquiry" (1 Simp. R. 10; Woll. R. 3; MacK. R. 3). Precisely in what respect or respects the questions were pertinent was essentially an evidentiary matter, and it is not the function of an indict-

---

[7] The jury was instructed in each case that to convict it must find the accused's refusals to have been "deliberate and intentional as distinguished from accidental or inadvertent or unintentional" (2 Simp. R. 126; Woll. R. 98; MacK. R. 87). This instruction correctly defined the nature of the intent required to be proved under 2 U. S. C. 192. *Quinn* v. *United States*, 349 U. S. 155, 165; *Sinclair* v. *United States*, 279 U. S. 263, 299.

[8] Petitioners Wollam and MacKenzie also make this contention (Pet. 25, 27), but neither presented it in the courts below.

ment to set forth evidence. See Rule 7 (c), F. R. Crim. P. (*supra*, p. 11). Moreover, even assuming, *arguendo*, that an indictment under 2 U. S. C. 192 should state not merely that the questions which the accused refused to answer were pertinent, but how they were pertinent, the failure to set forth the details establishing the latter would be at most a "defect" or "irregularity" which, because it would "not affect substantial rights," should "be disregarded" (Rule 52 (a), F. R. Crim. P.).[9]

Petitioners' reliance (Pet. 13) on *United States* v. *Lamont*, 236 F. 2d 312 (C. A. 2), is misplaced. That decision turned on the fact that the indictment there involved "on its face charge[d] no offense" (*id.* at 315) because the questions which the accused in that case were charged with having refused to answer were concerned exclusively with their "possible participation in or knowledge of subversive or leftist activities" (*id.* at 313), whereas the authority of the committee before which the refusals were made (a subcommittee of the Senate Committee on Government Operations) was limited to "studying the operation of Government activities * * * with a view to determining its economy and efficiency" (*id.* at 315).

---

[9] That the questions in issue were in fact pertinent is, we submit, clear. The count 1 question in each indictment related to the accused's place of residence at the time of his appearance before the committee. As observed by the Court of Appeals, "Where the question * * * is obviously simply one of identification of the witness the pertinency is not obscure. * * * Testimony of any kind must be laid stone on stone. The first relevant point is: Who is the witness, anyway? * * *" (Pet. 37–38).

3. Petitioners' contention (Pet. 14–15, 25, 27) that they were entitled to "trial by jury on the issue of pertinence" (Pet. 14) is also without any merit. This precise contention was rejected by this Court in *Sinclair* v. *United States*, 279 U. S. 263, 298–299, where it was held that "[t]he question of pertinency" under 2 U. S. C. 192, like "the question as to materiality of false testimony charged as perjury in prosecutions for that crime," is "one for the court" (279 U. S. at 298).[10]

4. Petitioner Simpson urges that his conviction on count 1 (refusal to state his residence) cannot stand because the committee allegedly already knew where he lived, so that the asking of the question could not have "serve[d] a legislative purpose" (Pet. 16).[11] That the committee already knew where he lived, he says, is clear from its subsequent question, "Isn't it a fact that you live at 9115 North Geneva, Portland,

---

[10] See also *Keeney* v. *United States*, 218 F. 2d 843, 845, 846, 849 (C. A. D. C.). *United States* v. *Orman*, 207 F. 2d 148, 155–156 (C. A. 3), cited by petitioners (Pet. 14–15), is distinguishable. It was there held that, where "evidence *aliunde* was introduced to prove pertinency," it was "proper" for the court, if satisfied that "pertinency has been proven," to "submit the question and the evidence to the jury under appropriate instructions" (207 F. 2d at 156). The decision does not hold that a defendant in a prosecution under 2 U. S. C. 192 has a right to have the issue of pertinency submitted to the jury, but merely that it was not error in the circumstances of that case to do so, provided the court first satisfied itself that pertinency was established. The defendant in *Orman* was contending that the trial court had erred in submitting the issue of pertinency to the jury (207 F. 2d at 155)—the precise opposite of petitioners' contention.

[11] Petitioners Wollam and MacKenzie seek to adopt this contention by reference (Pet. 25, 27). Neither, however, raised the issue in the Court of Appeals.

Oregon?" (*ibid.*). At least, he argues, he should have been permitted to "adduce conclusive evidence that the Committee knew" his place of residence (*ibid.*).

Obviously, however, a committee may ask a witness a question designed to confirm or substantiate previously elicited testimony or information. Cf. *Young* v. *United States*, 212 F. 2d 236, 239 (C. A. D. C.), certiorari denied, 347 U. S. 1015. The fact that a committee may have certain information in its files does not prevent it from seeking to verify the information by questioning the person best qualified to supply such verification—in the case of an address, the person reported as living there. As noted by the Court of Appeals, "The informal knowledge one has of where a witness lives and of his identity may be entirely erroneous" (Pet. 35).

5. Simpson's contention (Pet. 21–22) that it was error for the trial court to deny his motion for a subpoena *duces tecum* calling for all of the committee's files containing "information about" him (1 Simp. R. 31)[12] is clearly insubstantial. The sole purpose of the request, as observed by the trial court in denying the motion, was to attempt to prove that the committee "already had some information concerning the matters called for by the questions in the indictment" (2 Simp. R. 3; see also 1 Simp. R. 32). Since, as we

[12] Like motions were made by Wollam and MacKenzie (Woll. R. 8–9; MacK. R. 9–10), but those petitioners failed to challenge the orders of denial on appeal. Hence, their attempt to incorporate the present contention of petitioner Simpson by reference (Pet. 25, 27) is misconceived. The orders of denial were in any event correct for the same reasons for which the order of denial in Simpson's case was proper.

have already pointed out (*supra*, p. 15), that fact would have been irrevelant, the court correctly refused to issue the subpoena. Cf. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 219.

6. In petitioner Simpson's sixth and final point he groups five additional alleged errors of the trial court (Pet. 22–23).[13]

(*a*) It is argued that it was error for the court to select the *Simpson* jury from the same panel from which the *Wollam* jury had been selected the preceding day (Pet. 22). It is settled, however, that a juror is not disqualified to sit in successively tried cases against different defendants charged with similar but independent offenses, even though the evidence in the two cases may be similar and the witnesses the same, so long as each juror is able (as here) to avow at the *voir dire* examination that he is capable of deciding the second case fairly and impartially. *Wilkes* v. *United States*, 291 Fed. 988, 990 (C. A. 6), certiorari denied, 263 U. S. 719; *Haussener* v. *United States*, 4 F. 2d 884, 886 (C. A. 8); *Belvin* v. *United States*, 12 F. 2d 548, 550 (C. A. 4), certiorari denied, 273 U. S. 706. Furthermore, since Simpson has never disputed and does not now dispute that he did appear before the committee and did in fact deliberately and intentionally refuse to answer the committee's questions as charged—these being the only issues which the jury was called upon to decide (see 2 Simp. R. 127)—

[13] While petitioners Wollam and MacKenzie seek to adopt the point by reference (Pet. 25, 27), most of the alleged errors listed under it are inapplicable to those petitioners, and none was urged by either in either court below.

there is no basis for a charge of prejudice in any event, and Simpson does not charge that he was actually prejudiced by the procedure followed.

(*b*) It is then argued that the court erred in "refus[ing] to permit the Portland agent of the F. B. I. to answer questions propounded to him to show that the United States had information, which was made available to the committee, that justified petitioner in exercising his privilege under the Fifth Amendment to refuse to answer each of the questions on which the indictment was based" (Pet. 23).

This contention misstates the record. There was no suggestion at the trial that the purpose of the questions which Simpson's counsel propounded to the F. B. I. agent, Mr. Santoiana, was, as Simpson now claims (*supra*), "to show that the United States had information, which was made available to the committee, that justified petitioner in exercising his privilege under the Fifth Amendment to refuse to answer each of the questions on which the indictment was based." The record indicates no more than that the court sustained government objections to two questions by Simpson's counsel—(1) whether the agent "ha[d] any information regarding" Simpson prior to the time of the latter's appearance before the committee, and (2) whether the agent had consulted with or been consulted by members or employees of the committee (2 Simp. R. 92). Counsel made no offer of proof, nor did he even suggest, that the purpose of the questions had any relation to the propriety of Simpson's claim of privilege under the Fifth Amendment. The actual purpose of the questions was merely to at-

tempt to show that the committee "already had" the information which it sought to elicit from Simpson by the questions which he refused to answer as charged in the indictment—a fact which, if true, was, as we have seen, irrelevant (*supra*, p. 15). That this was the true purpose of the questions is clear from the statement in Simpson's main brief in the Court of Appeals (p. 19) that "[a]ppellant tried to prove by the records of the Committee itself and through the testimony of the head of the F. B. I. office in Portland that both agencies of the Government knew unqualifiedly the answers to each of the six questions that are involved in this case." Thus, the present attempt to inject the Fifth Amendment into the issue of the propriety of the trial court's sustaining of the Government's objection to the questions propounded to the F. B. I. agent has no record justification."[14]

(*c*) It is said that the trial court erred in permitting "material acts of Congress, the committee and the subcommittee to be proved by parol evidence without showing that the records of the alleged acts were unavailable" (Pet. 23).

The parol evidence complained of was the testimony of the committee counsel concerning such matters as the sources of the authority of the House Committee on Un-American Activities and of the subcommittee before which the petitioners appeared (2 Simp. R. 15–20). Such testimony is not incompetent. Cf. *In re Ko-ed Tavern*, 129 F. 2d 806, 810 (C. A. 3); *Her-*

[14] Simpson's first suggestion that the Fifth Amendment was in any way germane to the questions propounded to the agent was made in his reply brief in the Court of Appeals (at p. 19).

zig v. *Swift & Co.*, 146 F. 2d 444, 446 (C. A. 2); 4 Wigmore, *Evidence* (3d ed. 1940), § 1178. In any event, no difference between the witness's testimony and the public records establishing the facts is asserted. Accordingly, there is no basis for any claim of prejudice, and, in fact, none is claimed.

(*d*) Another point is that the trial court erroneously "failed to provide opportunity to petitioner [Simpson] to present evidence on [the] issues [of pertinency and privilege] outside the presence of the jury" (Pet. 23).

The record indicates that counsel for Simpson first made his request for leave to present evidence on these issues "outside the presence of the jury" in a motion for a new trial (1 Simp. R. 40, 41; 3 Simp. R. 33–34, 38), filed five days after the trial and verdict. The trial judge pointed out to counsel for Simpson, during oral argument on the motion, that he (the judge) had asked Mr. Goodman, counsel for petitioner Wollam, on the day preceding the *Simpson* trial and during the *Wollam* trial, whether Mr. Goodman desired to try the issues of pertinency and privilege outside the presence of the jury; that Mr. Goodman told the judge he "wanted it to be heard in the presence of the jury," which course the judge permitted; that counsel for Simpson was "present in the courtroom" during that colloquy, so that he "could not have been in any doubt at all" as to the judge's "attitude in the matter" and of his privilege of adducing evidence on these issues, if he desired to, during the trial, either within or without the jury's presence (3 Simp. R. 38; see also *id.* 33–34). Such a

request, the judge further remarked, would have been granted "at the drop of a hat" if counsel "had asked for it" (*ibid.*).

While, for the foregoing reasons, the judge declined to grant the motion for a new trial or otherwise to reopen the case for the purpose of taking evidence on the issues of pertinency and privilege (3 Simp. R. 42), he invited counsel to, "if he wishes, add any showing that he wants to the record so that he will have a full record if an appeal is desired" (*id.* 44; see also *id.* 45). Nothwithstanding this explicit invitation, counsel at no time thereafter, either in the trial court or the Court of Appeals, made any offer of proof, nor did he in any way indicate the nature of the evidence he had proposed to adduce on those issues, nor, indeed, does he do so now. Under these circumstances, we submit that there was no abuse of discretion in the denial of the motion by the trial court, nor is there any basis for a claim of prejudice.

(*c*) There is, finally, no basis for petitioner Simpson's contention that he was sentenced to the punishment which was imposed "for something that [he] did not say" (Pet. 23). The record shows that the trial judge's passing reference to "this Government that you [Simpson] condemned or condemn," which he made immediately prior to his imposition of sentence (3 Simp. R. 62), was merely the judge's characterization of certain views critical of the Government which Simpson had a moment previously ex-

pressed in a pre-sentencing statement to the court (see *id.* 55–58).[15]

CONCLUSION

For the reason stated *supra*, at pp. 7–10 it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgments be reversed without further briefs or argument.

J. LEE RANKIN,
Solicitor General.

JULY 1957.

---

[15] In a section of the petition for certiorari under the heading "joinder of petition by Donald M. Wollam and John Rogers MacKenzie" (Pet. 25), petitioners Wollam and MacKenzie state as a "question presented," which they say should be answered in the negative, but which they do not otherwise discuss or mention, the question of whether the committee chairman instructed them to answer the questions which they were charged in their indictments with having refused to answer "in accordance with the strict standards required by" this Court in *Quinn* v. *United States*, 349 U. S. 155, and *Emspak* v. *United States*, 349 U. S. 190 (*ibid.*). The committee proceedings involving these petitioners, which are respectively set forth *verbatim* in the *Wollam* and *MacKenzie* opinions in the Court of Appeals (Pet. 42–52, 54–59), show this contention (which was made for the first time in the Court of Appeals) to be wholly without merit.

U. S. GOVERNMENT PRINTING OFFICE: 1957